



INTERIOR BOARD OF INDIAN APPEALS

Shoshone-Paiute Tribes of the Duck Valley Reservation
v. Director, Bureau of Indian Affairs

39 IBIA 103 (08/26/2003)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SHOSHONE-PAIUTE TRIBES OF THE	:	Order Docketing and Dismissing
DUCK VALLEY RESERVATION,	:	Appeal and Referring Matter to
Appellant	:	the Assistant Secretary - Indian
	:	Affairs
v.	:	
	:	Docket No. IBIA 03-131-A
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee	:	August 26, 2003

The Board of Indian Appeals (Board) has received a notice of appeal from the Shoshone-Paiute Tribes of the Duck Valley Reservation (Tribes). The Tribes seek review of a letter signed on July 14, 2003, by the Director, Bureau of Indian Affairs (Director; BIA), declining to grant the Tribes a waiver of the National Fire Protection Association (NFPA) 101 Life Safety Codes in regard to the construction of a juvenile detention center on the reservation. For the reasons discussed below, the Board docket this appeal, but dismisses it for lack of jurisdiction. However, based on the authority of 43 C.F.R. § 4.337(b), it refers the matter to the Acting Assistant Secretary - Indian Affairs (Assistant Secretary) for further consideration.

The Director's July 14, 2003, decision did not contain any appeal information. The Tribes filed their appeal with the Assistant Secretary, who transmitted the appeal documents to the Board.

The first issue raised in this appeal is who has jurisdiction to review a decision issued by the Director. The position of Director was created in a recent reorganization of the BIA. The new position is equivalent to the position formerly titled Deputy Commissioner, BIA. BIA position titles have been changed throughout the years, and corresponding amendments have not always been made in the appeal regulations in the Code of Federal Regulations. That is the case here.

In determining whether it has jurisdiction to review decisions issued by a person in a reorganized position when the prior position title has not been amended in the Code of Federal Regulations, the Board has based its decision on whether or not it had jurisdiction to review decisions issued by the person in the position which previously would have issued those decisions. When it had jurisdiction to review decisions issued by the person in the prior position, it has

found that it has jurisdiction to review decisions issued by the person in the reorganized position. See, e.g., Henderson v. Portland Area Director, 16 IBIA 169, 174 n.8 (1988). However, if it did not have jurisdiction to review those decisions, the Board has found that it does not have jurisdiction to review decisions issued by a person in the reorganized position. See, e.g., Union Oil Co. v. Director, Farmington Indian Minerals Center, 35 IBIA 127 (2000).

In this case, the Board had jurisdiction to review decisions issued by both the Commissioner of Indian Affairs and by the Deputy Commissioner. The reorganization which changed the title of Deputy Commissioner to Director evidenced no intent to alter the established process for administrative review. Under these circumstances, the Board finds that it has jurisdiction in general to review decisions issued by the Director.

Therefore, the Director's decision should have included information about the right to appeal to the Board. See 25 C.F.R. § 2.7(c). In this instance, the failure to include that information constituted harmless error, because the Tribes filed a notice of appeal with the Assistant Secretary, who transmitted that notice of appeal to the Board so that it was received within the time period for filing a notice of appeal.

However, even though it has jurisdiction to review decisions issued by the Director in general, the Board's jurisdiction is limited in other ways. The Tribes seek review of a decision declining a request to waive the requirements of the NFPA 101 Life Safety Codes. Assuming for purposes of this order that the requirements can be waived, the decision as to whether or not they should be waived is discretionary, just as is a decision as to whether or not a regulation should be waived. See, e.g., Sanders v. Muskogee Area Director, 19 IBIA 213 (1991). Cf. Skye v. Aberdeen Area Director, 26 IBIA 169 (1994) (BIA lacks authority to waive a regulation if waiver would result in a violation of a statute). The Board lacks jurisdiction to review a decision based upon the exercise of discretion committed to BIA. 43 C.F.R. § 4.330(b)(2); Sanders. Under 43 C.F.R. § 4.337(b), it may dismiss such appeals or refer them to the Assistant Secretary for consideration.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is docketed, but dismissed for lack of jurisdiction to review a decision based upon the exercise of discretion. However, the matter is referred to the Assistant Secretary for review of the exercise of discretion by the Director, Bureau of Indian Affairs. 1/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

1/ Should it be the case that BIA cannot legally waive the NFPA 101 Life Safety Codes, the Assistant Secretary has inherent authority to reach that conclusion.